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Supreme Court

of the

United States

OCTOBER TERM, 1979

NO. 79-1405

DR. HAROLD KAUFMAN AND RUTH ZICREE,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioners, Harold Kaufman and Ruth Zicree, respectfully pray that a writ of certiorari issue to review the judgment, opinion and order on rehearing of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 8, 1979, and January 11, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, reported as *United States v. Zicree,* 605 F.2d 1381 (5th Cir. 1979) and the opinion denying the petition for rehearing, 609 F.2d 826 (5th Cir. 1980), both appear in the Appendix attached hereto. (App. pp. 1-23)

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 8, 1979. A timely petition for rehearing was denied with an opinion on January 11, 1980. For good cause shown, this Honorable Court extended the time for filing the present petition for a writ of certiorari until March 12, 1980. This Court's jurisdiction is invoked under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED

Whether the Court erred in holding that the evidence presented at the trial below was sufficient to prove that the petitioners were knowing participants in a scheme to defraud under Title 18 U.S.C.A. §1341.

Whether the Court erred in holding that the initial and continued joinder of the petitioners, Kaufman and Zicree, with Dr. Gonzalez was proper under Rules 8(b) and 14 of the Federal Rules of Criminal Procedure.

STATUTORY PROVISIONS INVOLVED

Title 18, U.S.C.A. §1341.

Rule 8(b), Federal Rules of Criminal Procedure.

Rule 14, Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE AND FACTS

This petition attacks the opinion and judgment of the Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Southern District of Florida. The petitioners, Kaufman and Zicree, were tried before a jury on a 189-count indictment which charged 188 counts of mail fraud under Title 18, U.S.C.A. §1341 and one count of conspiracy under Title 18, U.S.C.A. §371.

At the close of all of the evidence, eight of the co-defendants were severed for a subsequent retrial[1] and 28 of the mail fraud counts were dismissed by the trial court. (App. pp. 2-3) The petitioners, Kaufman and Zicree, were convicted on eight of the mail fraud counts and acquitted by the jury on all of the remaining counts. These eight counts represented one mailing on patient Lacey and seven mailings on patient Raiford. Co-defendant Gonzalez was convicted on 18 mail

[1]The lawyers' group of defendants which included Capodilupo, Lang, Lisker, Safford, Johnson, Huff and Fields have not been retried because the government dismissed the pending indictment. To this date, none of these defendants have been reindicted on similar charges. The trial court granted co-defendant Freeman's motion for judgment of acquittal.

fraud counts and acquitted on the remaining counts. (App. p. 3)

At the outset, the petitioners note that Dr. Kaufman is a sixty-eight year old physician who has never before been arrested for a criminal act but now faces the longest prison term of any defendant—six years. (App. p. 3) Likewise, petitioner Zicree has never been arrested for a criminal offense.

On appeal to the Fifth Circuit, the petitioners raised numerous issues, to wit: the sufficiency of the evidence; improper joinder with co-defendant Gonzalez under Rule 8(b), Federal Rules of Criminal Procedure; prejudicial joinder under Rule 14, Federal Rules of Criminal Procedure; the giving of a coercive *Allen* charge to the jury; the improper admission of expert handwriting analyst testimony; and the suppression of favorable exculpatory evidence by the prosecution. The Court of Appeals rejected each of the above contentions and affirmed the convictions of all three defendants on appeal (the petitioners and Gonzalez).

Subsequently, the petitioners filed a petition for a panel rehearing on the sufficiency and the joinder issues. It is submitted that the Court of Appeals relied upon erroneous legal conclusions and misapprehended material facts adduced through the testimony of the government's key witness Patricia Hope. (TR. 7, pp. 393-450.) It is further submitted that the misinterpretation of Patricia Hope's testimony, as reflected in part by the opinion on the rehearing petition, was the key to the Court of Appeals' conclusion that the petitioners were knowing participants in the

scheme charged. Hope was the only Kaufman/Zicree employee to testify for the government regarding the internal operation of the petitioners' clinic. (App. p. 6) The same erroneous factual conclusions further served to support the Court of Appeals' conclusion that the initial and continued joinder of Kaufman and Zicree with Dr. Gonzalez was not in violation of Rules 8(b) and 14 of the Federal Rules of Criminal Procedure. (App. pp. 9-16)

REASONS FOR GRANTING THE WRIT

I.

THE EVIDENCE PRESENTED AT THE TRIAL BELOW WAS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH THAT THE PETITIONERS WERE KNOWING PARTICIPANTS IN A SCHEME TO DEFRAUD AUTOMOBILE INSURANCE CARRIERS.

The indictment charged that from 1972 through 1977, petitioner Kaufman, a medical doctor, and petitioner Zicree, his private secretary, had devised and effected a scheme to defraud insurance companies by falsely inflating the medical bills of automobile accident patients. The prosecution's theory of the case was that the petitioners would bill for physiotherapy treatments that were never given and order unnecessary hospitalizations for the purpose of exceeding Florida's $1,000 "no-fault" threshold. The prosecution then theorized that once said "no-fault" threshold was reached, the co-defendant Capodilupo, a lawyer, would use the falsely inflated bills to support a claim against

the insurance companies for pain and suffering. (App. p. 2)

The focus of the government's case was the office procedure employed in administering physiotherapy treatments to automobile accident patients and later recording said treatments for billing purposes. (App. p. 2) From the outset, the Court must be aware of the fact that the petitioners, Kaufman and Zicree, had nothing to do with the administration of the treatments and the subsequent recording of the treatments on the patients' records. (App. p. 8) The record also clearly reflects that neither Kaufman nor Zicree had any contact with the patients treated by Kaufman's clinic because on the days that they came in for physiotherapy treatments, said treatments were administered and recorded by the medical assistants employed by Dr. Kaufman. (TR. 7, pp. 396, 431, 435; TR. 35, pp. 3684-3686; TR. 36, pp. 3727, 3738, 3760, 3776.)

The Court of Appeals relied solely upon the testimony of three witnesses in concluding that the government had carried its burden of proving that there was a scheme to defraud in which the petitioners were knowing participants. (App. p. 6) Patricia Hope worked as a medical assistant in Dr. Kaufman's office for only eight or nine months during late 1972 and early 1973. (TR. 7, pp. 393-395.) Hope's primary duties were to administer and record physiotherapy treatments. The other two witnesses were Edward Lacey, a patient who was the subject of Count One, and Freddie Lee Raiford, a patient who was the subject of Counts 74 through 80. (TR. 16, pp. 1654-1683; TR. 20, pp. 2166-2187.)

Before the testimony of these three witnesses is analyzed, it is important to emphasize the general office procedures utilized in Dr. Kaufman's clinic as well as who actually performed the various functions. Patients injured in legitimate automobile accidents came to the clinic for examination and treatment. Based upon objective test results and subjective patient complaints, Dr. Kaufman made the decision as to the proper course of treatment. (TR. 36, pp. 3731-3738.) The government presented no witnesses to challenge Dr. Kaufman's decision to hospitalize any of the patients named in the indictment. In fact, Edward Lacey was never hospitalized by Dr. Kaufman. (TR. 20, pp. 2177-2184.)

Those patients requiring physiotherapy treatments came to the clinic on a schedule designed to fit the particular case. The most frequent treatment procedure was the administration of physiotherapy by one of the medical assistants for a number of weeks or months until the injuries subsided. Neither Dr. Kaufman nor Ruth Zicree had anything to do with administering the physiotherapy treatments to the patients or maintaining the records therefor. Physiotherapy treatments were performed at the rate of 50 to 100 per day, five and a half days per week. (TR. 35, p. 3688; TR. 36, pp. 3741-3742.)

Patricia Hope and the other assistants followed this treatment procedure: (1) Patients came in and were supposed to sign a sheet of paper at the front desk and wait to be called for treatment; (2) one of the assistants would then pull that patient's 5x8 treatment card from the files; (3) when the patient's turn came, an assistant was supposed to administer the treatment and record it

on the 5x8 card by noting the date and the word "physio"; (4) if the patient was to be examined on that day, a blank space was left for the doctor's comments; (5) when a patient was discharged from the Doctor's care, another assistant would pull the 5x8 cards from the files and prepare the patient's bill. (TR. 7, pp. 396, 431, 435; TR. 35, pp. 3684-3686; TR. 36, pp. 3727, 3728, 3760, 3776.) It must be made clear that neither Kaufman nor Zicree had anything to do with the above procedures. (TR. 36 p. 3738.)

Neither petitioner witnessed patients sign in or receive treatments from the medical assistants, nor does the record reflect that they had anything to do with the preparation of the Lacey and Raiford bills. The Court of Appeals erroneously concluded that Zicree prepared the Lacey and Raiford bills because she typed the reports to which the bills were attached. (App. p. 8) The undisputed portions of the record reflect that Dr. Kaufman had no part in preparing the patient bills or records.

The government's proof against the petitioners on the eight counts they were convicted on consisted of the testimony of the patients Lacey and Raiford and that of Patricia Hope, the only Kaufman/Zicree employee who testified as a government witness. Lacey and Raiford, on their direct examination, testified that their recollection of the number of times they received treatment at Dr. Kaufman's office were less than appeared on their final bills. Hope testified that she worked for Dr. Kaufman for only eight or nine months during late 1972 and early 1973. (TR. 7 pp. 393-395.) Her testimony was not tied to any count. Hope's testimony clearly establishes that any

errors in the preparation of the medical bills were either the result of clerical errors or the intentional acts of the medical assistants and were not authorized by either of the petitioners. Hope positively testified that she had *never* been instructed by either Kaufman or Zicree to record a physiotherapy treatment for the purpose of inflating the bills. (TR. 7, p. 434.) In fact, she testified that she had followed the procedures of the other employees in her job because the petitioners did not instruct her on these procedures. (TR. 7, pp. 401, 434.)

In the panel opinion, the Court of Appeals misquoted material portions of Hope's testimony to reach the conclusion that any possible errors in the bills were the product of the petitioners' knowing and intentional acts of falsification. (App. pp. 6-9) At page 1385 of the panel opinion (App. p. 6), the Court stated: "She testified that Kaufman instructed her to record treatments for patients who did not actually receive them." Patricia Hope never made such a statement regarding either petitioner, yet the Court of Appeals relied heavily upon it to prove that the petitioners were knowing participants in a fraudulent scheme.

In its opinion denying the petition for rehearing, the Court of Appeals acknowledged its error and stated that Hope had never been given said instructions by Dr. Kaufman. (App. p. 22) Despite this admittedly material error, the Court of Appeals denied rehearing by relying upon the balance of Hope's testimony and again stating that her testimony was sufficient to carry the government's burden of proof. It is submitted that without specific testimony from Hope, a jury could only speculate as to the petitioners' knowledge or intent. The

petitioners' hypothesis of innocence is that any errors in the bills were clerical or the result of employees' acts not authorized by the petitioners. Even assuming, *arguendo,* that the patients and the lawyer had schemed to defraud insurance companies, the record shows no evidence of the petitioners' knowledge and intent, the key element of mail fraud. See, *United States v. Foshee,* 569 F.2d 401 (5th Cir. 1978); *reh.,* 578 F.2d 629 (5th Cir. 1978), 606 F.2d 111 (5th Cir. 1979); *United States v. Pearlstein,* 576 F.2d 531 (3d Cir. 1978). Mere association does not make one a co-schemer. *United States v. Alvarez,* ____ F.2d ____, Slip Opinion p. 2746 (5th Cir. Jan. 30, 1980).

To compound the injustice in the present case, the Court of Appeals again misstates Hope's testimony in the rehearing opinion. The Court of Appeals quotes Hope as testifying that the procedure in Kaufman's office was to record treatments for patients who did not actually receive them. (App. p. 22) The opinion does not point out her explanation on cross-examination that *if* an occasional erroneous notation was made by another employee, it was made without the knowledge or direction of Kaufman or Zicree. (TR. 7, p. 401.)

Hope's testimony further reflects that she was supervised by another employee, Theresa Scott, not by the petitioners. (TR. 7, p. 401.) As Scott's grand jury testimony reflects, accidental overcharges resulted from the heavy patient load, not from an intended scheme to defraud on the part of the petitioners. To be a conspirator or a co-schemer, the defendant must intend that his acts further the illicit scheme.

The rehearing opinion next quotes Hope's testimony as follows: "Kaufman specifically instructed her to leave spaces on the patients' records between the dates recorded for (actual) visits so that Kaufman could write in the spaces later." (TR. 7, p. 410; App. p. 22) The rehearing opinion does not point out Hope's explanation for the above referenced spaces on the 5x8 cards. (TR. 7, pp. 430-432.) Hope explained that said spaces were left to allow the doctors in the office to note their examination findings and progress reports. Hope testified that she had seen Dr. Kaufman use the spaces for that purpose and not to pad the bills. (TR. 7, pp. 430-432.)

The rehearing opinion next refers to Hope's statement that she overheard Kaufman telling patients to sign the register book on back dates so the register would show more treatments. This testimony appears in a single answer on page 429 of the Record. Trial counsel never cross-examined Hope on it, and we, therefore, do not know who these patients are, when this occurred, *and, most important, whether this statement of Kaufman pertained to a patient or patients who had previously failed to sign the register book on occasions when they actually received physiotherapy treatment.* This latter innocent hypothesis is not reasonably foreclosed by Hope's testimony in this regard.

Moreover, the rehearing opinion fails to point out that the register book had nothing to do with the 5x8 treatment cards or the bills. The sign-in book merely served to keep track of the patients in the waiting room and as a rough estimate of the gross number of treatments rendered. (TR. 36, p. 3727.)

Petitioners also respectfully suggest that the *entire* testimony of the patients Lacey and Raiford was insufficient to establish that their medical bills were false. Regarding Lacey, the Court of Appeals simply noted that his bills reflected 16 physiotherapy treatments, but in his testimony, he only recalled six treatments. (App. p. 6) The opinion totally disregards Lacey's hesitancy on direct examination and his cross-examination which revealed that he had virtually no recall of the accident or his treatment five years prior to the trial.

Edward Lacey was only 14 years old at the time of the accident and in the custody of his parents. (TR. 20, pp. 2169-2171.) The parents were never called as witnesses below. Lacey's inability to testify accurately is manifested by his own testimony. He was unable to identify Kaufman or Zicree at trial (TR. 20, p. 2166), nor did he recall that before he went to Dr. Kaufman he was placed in the hospital by a Dr. Barrett for emergency treatment of a suspected neck/back fracture. (TR. 20, pp. 2177-2184.) Despite Lacey's obvious lack of recall, the panel opinion held that the discrepancy between the bill for 16 visits and Lacey's estimate of 6 visits was sufficient to establish the falsity of his medical bills. (App. p. 6)

The Court of Appeals similarly excerpted Freddie Lee Raiford's testimony in which he first stated that he only recalled six treatments which varied from his bills for 28 visits. (App. pp. 6-7) The opinion totally disregards several crucial aspects of Raiford's testimony wherein he admitted that his memory of the events surrounding his accident were hazy and that he could

have received many more treatments than he first recalled. (TR. 16, p. 1673.)

The opinion likewise disregarded Raiford's testimony which supported the petitioners' hypothesis that any arguable errors in some of the bills were the product of unintentional clerical errors. For example, on October 1, 1974, Raiford signed in at the clinic but before he was called for treatment, he grew impatient and left. The undisputed record reflects that when the petitioners' staff noticed this, they struck Raiford's signature from the sign-in sheet. The government stipulated that there were no charges for a physiotherapy treatment on that date. (TR. 16, p. 1677.)

The petitioners' behavior in Raiford's case was totally consistent with their hypothesis of innocence. Although Raiford's signature provided a golden opportunity to bill for a non-existent treatment with a corroborating signature for it, the petitioners made no charges for that date. Even if it is assumed that some errors occurred, there is no evidence that said errors were intentional.

The record below clearly reflects that both Lacey and Raiford had been at the clinic on every date that a treatment or examination was billed for. A comparison of the daily sign-in sheets to the bills shows a genuine signature for each corresponding entry on the bills. (GX 73 and 74; GX Raiford 2B and 2C; GX Lacey 1D and 1E.)

It is significant to note that one of the government's key theories below was that signatures on the sign-in

sheets had been forged to corroborate the allegedly false bills. However, the government's handwriting expert did not find a single forged signature on the Lacey or Raiford sign-in sheets. In fact, the government's expert did not even bring the Lacey and Raiford sign-in sheets to the stand when he testified. (TR. 23, pp. 2304-2305.)

The record reflects that the Newton Clinic treated 50 to 100 patients per day, five and a half days per week for five years. (TR. 35, p. 3688; TR. 36, pp. 3741-3742.) However, the government selected only 12 former patients as the subject of the indictment. The most reasonable hypothesis is that these alleged errors in the Lacey and Raiford bills were the result of clerical errors by the medical assistants responsible for the giving and recording of physiotherapy treatments. If the conclusion of the Court or the jury that the hypothesis of innocence has been excluded by means of speculation and conjecture, said verdict must be overturned. *United States v. Martinez,* 555 F.2d 1269 (5th Cir. 1977). Lacey and Raiford's testimony was at best speculative in nature.

Every patient who was the subject of counts in the indictment testified that he was involved in a legitimate automobile accident before he went to Dr. Kaufman. Accepting the principle that the reviewing court must read the evidence in the light most favorable to the government on the sufficiency issue, *Glasser v. United States,* 315 U.S. 60 (1942), the courts cannot abdicate their duty to direct a verdict of acquittal where the jury can only speculate as to guilt or innocence. *United States v. Martinez, supra; United States v. Ferg,* 504 F.2d 914 (5th Cir. 1974).

Specifically with regard to petitioner Zicree, the Court of Appeals' conclusions were no more than mere speculation. (App. p. 8) The panel opinion affirms Zicree's conviction by stating that her initials appear on both the medical bills and the narrative reports in the Lacey and Raiford cases. The opinion does not, however, reveal that Zicree's duties were as Kaufman's private secretary. It is not disputed that her initials appear on the typed reports because she typed them after the doctor reviewed the 5x8 cards and dictated said reports. However, she did not know the source of the information she typed. (TR. 7, p. 435; TR. 35, p. 3686; TR. 36, p. 3760.)

It is further submitted that to the best of undersigned counsel's recollection, her initials do not appear on the bills introduced into evidence by the government.[2] This erroneous factual conclusion by the Court of Appeals has two sources. The first is that said bills were routinely stapled to the reports when they were assembled. As noted above, during the usual operation of the clinic, the medical assistants recorded and prepared the bills for treatments, not Zicree. The second source of the Court of Appeals' conclusion was Patricia Hope's testimony that when she worked at the clinic, Zicree prepared the bills. (TR. 7, p. 429.) However, since Hope only worked at the clinic from late 1972 until early 1973, she would have no idea who prepared the Raiford bills in 1974. (TR. 7, pp. 393-395.) Not only is the conclusion that Zicree prepared the Lacey and Raiford bills speculative, it is contradicted by

[2]Undersigned counsel did inspect the government's exhibits while preparing the brief on appeal but has not been able to locate copies since the brief was prepared.

Kaufman and Zicree's testimony that Zicree stopped preparing the bills herself in May of 1973, after Hope left. (TR. 35, p. 3693; TR. 36, p. 3756.)

It is respectfully submitted that the opinion of the Fifth Circuit Court of Appeals in this case directly conflicts with the prior decision of the same court in the case of *United States v. Malatesta,* 590 F.2d 1379 (5th Cir. *En Banc,* 1979). In *Malatesta, supra,* the Fifth Circuit abolished the "slight evidence" rule regarding proof of a defendant's complicity in a conspiracy or scheme. Even if it is argued that there was a scheme between Dr. Gonzalez and the lawyers' group when she opened her own clinic in 1974, the government must prove by "substantial evidence" that the petitioners were knowing participants therein. *Id.* at p. 1382.

A reading of the Court of Appeals' opinion itself shows that the Court relied upon the tremendous amount of unfavorable evidence against Dr. Gonzalez to form the opinion that there was a scheme to defraud. The Court of Appeals then concluded that the repeated actions of the participants here was sufficient to prove intent, citing *United States v. Perez,* 489 F.2d 51 (5th Cir. 1973). (App. p. 8) As will be discussed, *infra,* the petitioners were greatly prejudiced by their joinder with Dr. Gonzalez. It is submitted that both the trial court and the Court of Appeals used Patricia Hope's testimony about the blatant fraudulent activities in Dr. Gonzalez' office against Dr. Kaufman and Ruth Zicree. The clearest example of this lies in the erroneous misquotation of Hope's testimony in the original appellate opinion regarding the question of whether the petitioners knew of or instructed Hope to falsify bills

and records. (App. p. 6; App. p. 22) The convictions of the petitioners were, therefore, not based upon substantial evidence of their own acts and knowledge.

It is respectfully submitted that a writ of certiorari should issue to the Fifth Circuit Court of Appeals to review its opinion herein because said opinion is based upon erroneous factual conclusions drawn from the testimony of Hope, Lacey, and Raiford.

II.

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE JOINDER OF PETITIONERS KAUFMAN AND ZICREE WITH DR. GONZALEZ WAS PROPER UNDER RULES 8(b) AND 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

As noted from the Court of Appeals' opinion, the petitioners contested both the initial joinder under Rule 8(b) of the Federal Rules of Criminal Procedure and their continued joinder with Dr. Gonzalez under Rule 14 of the Federal Rules of Criminal Procedure. (App. pp. 9-16) The petitioners relied heavily upon the case of *United States v. Levine,* 546 F.2d 658 (5th Cir. 1977) to support the argument that their joinder for trial with Dr. Gonzalez violated Rule 8(b).

The record reflects that Dr. Gonzalez had worked for Dr. Kaufman's clinic for one year, 1972 to 1973. (TR. 36, pp. 3742-3743.) In January of 1974, Dr. Gonzalez

opened her own office and severed all contacts with Dr. Kaufman. It should be noted from the outset that Kaufman and Zicree had nothing to do with the examination, treatment or claims of Dr. Gonzalez' patients. It should be further noted that the charges against Dr. Gonzalez arising from the treatment of automobile accident patients arose after she left her job with Kaufman and opened her own clinic. Finally, Dr. Gonzalez did not share in the fees or claims of even one Kaufman patient. The operation of the Gonzalez and Kaufman clinics were totally separate and distinct.

United States v. Levine, supra, holds that where the joinder of the parties is predicated upon the false legal premise that two proximate and simultaneous conspiracies/schemes with one common conspirator establishes a single conspiracy/scheme, Rule 8(b) has been violated and reversal is required. It is submitted that Rule 8(b) was violated in the present case because the government erroneously concluded that the proximate and simultaneous schemes between Gonzalez and Capodilupo and Kaufman and Capodilupo constituted a single scheme to defraud. The Court of Appeals' decision in the present case conflicts with its own prior opinion in *United States v. Levine, supra,* and this Court's opinion in *Kotteakos v. United States,* 328 U.S. 750 (1946).

The panel opinion thoroughly discussed the principles of *Levine, supra,* but then distinguished *Levine, supra,* by stating, ". . . Kaufman and Gonzalez worked with each other for one year covered in the indictment." (App. p. 12) For the purposes of Rule 8(b) analysis, this is a distinction without a difference

because as in *Levine, supra,* there were no joint acts between Kaufman and Gonzalez directed to a single illicit purpose. In fact, the lawyer Capodilupo referred patients to 30 or 40 other doctors not indicted in this case. (TR. 19, p. 2077, p. 2108.)

The fallacy of the reasoning in the Court of Appeals' opinion is apparent in the Court's analysis of Dr. Gonzalez' sufficiency argument on Count One, the Lacey count. Edward Lacey was the only patient treated by Dr. Kaufman while Dr. Gonzalez was employed at his clinic. Recall that Lacey never identified Dr. Gonzalez as having treated him while he was a patient in 1973. (App. p. 7)

In affirming Dr. Gonzalez' conviction on the one Lacey count, the opinion states that although the evidence is less strong because Lacey did not testify that he was ever treated by Dr. Gonzalez, she was employed by Dr. Kaufman during the year 1973. (App. p. 7) It is submitted that even if it is assumed that there was a Kaufman-Capodilupo scheme in 1972-1973, the Court of Appeals erred in concluding that Gonzalez was a knowing participant therein because said conclusion was based solely upon the fact that Dr. Gonzalez was an employee of Dr. Kaufman for that year. It is clear from the panel opinion that the key to the Court of Appeals' conclusion that there was a single scheme to defraud involving Kaufman, Gonzalez, and Capodilupo was the erroneous conclusion that solely by virtue of Dr. Gonzalez' *subsequent* fraudulent acts, coupled with her prior employment by Kaufman while Lacey was a patient, the evidence was sufficient to convict her on the Lacey count.

To support its conclusion that there was a single scheme to defraud, the Court of Appeals noted: Gonzalez used the same techniques in her own office after she left Kaufman's employ a year later; Gonzalez got patient referrals from a common lawyer, Capodilupo; and Gonzalez hired Patricia Hope as a medical assistant after she left Kaufman's employ. (App. p. 8)

The basis of the panel opinion is in direct conflict with the well established principles of conspiracy law that mere presence or association does not make one a co-conspirator or an aider and abettor of the crime charged. Mere association alone cannot be sufficient to establish that a defendant is a knowing and intentional *participant* in the criminal venture. *See, United States v. Reyes,* 595 F.2d 275 (5th Cir. 1979); *United States v. Sink,* 586 F.2d 1041 (5th Cir. 1978). Even if Gonzalez had knowledge of a scheme while she worked for Kaufman, there is no evidence whatsoever that she had taken any action to further said Kaufman-Capodilupo scheme or that she had any interest in said scheme while she was employed by Dr. Kaufman. See, *United States v. Stanchich,* 550 F.2d 1294 (2nd Cir. 1977).

The same analysis applies to the joinder of Kaufman and Zicree with Gonzalez for trial on the counts arising from the operation of Gonzalez' clinic *after* she left Dr. Kaufman. There was not one shred of evidence presented to the grand jury or the petit jury to show that Kaufman and Zicree had any proprietary or financial interest in Dr. Gonzalez' clinic. As in *Levine, supra,* the existence of a common party such as the lawyer Capodilupo does not indicate a single scheme. In

fact, the record reflects that Capodilupo referred accident patients to 30-40 other doctors. (TR. 19, pp. 2077; 2108.)

Reduced to its simplest terms, the fact that Dr. Gonzalez worked for Dr. Kaufman for one year is not sufficient to prove that she was then participating in a scheme to defraud involving Dr. Kaufman, Ruth Zicree and the lawyer Capodilupo. It is submitted that even if it is assumed that Dr. Gonzalez knew there was a scheme to defraud between Capodilupo, Kaufman and Zicree, and that she later copied it when she opened her own clinic, that does *not* constitute participation in the former scheme.

It is this clearly erroneous reasoning that the Court of Appeals applied in analyzing Gonzalez' conviction on the Lacey count that led to the conclusion that there was a single overall scheme/conspiracy. As in *Kotteakos v. United States, supra,* and *United States v. Levine, supra,* the existence of proximate and simultaneous schemes with one common conspirator, Capodilupo, does not justify the initial joinder of Kaufman and Zicree with Gonzalez under Rule 8(b), Federal Rules of Criminal Procedure. Improper joinder under Rule 8(b) is prejudicial *per se* and reversal is required as a matter of law. *United States v. Levine, supra; United States v. Nettles,* 570 F.2d 547 (5th Cir. 1978).

The petitioners submit that even though the erroneous joinder under Rule 8(b) would be dispositive, relief should also have been granted under Rule 14 of the Federal Rules of Criminal Procedure. The record below clearly reflects that the petitioners suffered the most

compelling prejudice from their continued joinder with Gonzalez. *See, United States v. Lane,* 584 F.2d 60 (5th Cir. 1978); *Schaffer v. United States,* 362 U.S. 511 (1960); *Kotteakos v. United States,* 328 U.S. 750 (1946).

The core of the Rule 14 severance issue in this case was the fact that Patricia Hope had been called as a witness against both Kaufman and Gonzalez. (TR. 7, pp. 393-450.) Hope was the only former Kaufman/Zicree employee to testify for the government. Her testimony regarding Kaufman and Zicree was minimal. In fact, her testimony was exculpatory in character because she clearly stated that neither Kaufman nor Zicree had ever instructed her to falsify a bill or record, nor did they have any knowledge of such activities on the part of any employees. (TR. 7, p. 434.) Furthermore, Hope only worked for Kaufman as a medical assistant for 8-9 months during the five-year period covered by the indictment. (TR. 7, p. 393.)

The analysis of the Court of Appeals totally failed to consider the obvious spillover to Dr. Kaufman and Ruth Zicree of the tremendous amount of incriminating testimony that Patricia Hope gave regarding Dr. Gonzalez. Hope testified that when she became employed by Gonzalez after leaving Dr. Kaufman's office, she was aware of numerous fraudulent practices by Dr. Gonzalez. Hope testified that Dr. Gonzalez had specifically instructed her to falsify patient bills and records. (TR. 7, pp. 413-415; 415-426; 440-441.) Gonzalez had encouraged both patients and employees to falsify the records to build up the personal injury claims. In fact, Hope testified that Dr. Gonzalez had knowingly and intentionally falsified the records of

Hope's accident and subsequent treatments. (TR. 7, pp. 415-426.) Hope's testimony regarding Gonzalez' blatant acts of falsifying patient records was corroborated by another Gonzalez employee, Wendy Jones. (TR. 20, pp. 2091-2094.)

It is submitted that the prejudicial "spillover" of the evidence against Dr. Gonzalez was so great that a severance was the only just remedy. See, *Kotteakos v. United States, supra; United States v. Varelli,* 407 F.2d 735 (7th Cir. 1969). The clearest example of the prejudicial "spillover" of Hope's testimony is the original opinion of the Court of Appeals which obviously did not properly categorize Hope's testimony as to Kaufman and Gonzalez when it erroneously stated that, "She testified that Kaufman instructed her to record treatments for patients who did not actually receive them." (App. p. 6) In its rehearing opinion, the Court acknowledged this error. (App. p. 22) It is submitted that said error was the product of Hope's testimony that Dr. Gonzalez had given her specific instructions on falsifying patient records. (TR. 7, pp. 440-441.)

It cannot be disputed that the same errors were made by the jury below who only had the opportunity to hear Hope's testimony one time before deliberating their verdict. As pointed out in the petitioners' briefs below, this prejudicial "spillover" was exacerbated by the prosecutor's opening and closing statements to the jury that Dr. Gonzalez had learned all that she *knew* (about committing fraud) from Dr. Kaufman during the year that she worked for him. (TR. 40, pp. 14-16; TR. 38, pp. 3894, 3907.)

It is respectfully submitted that the joinder of petitioners Kaufman and Zicree with Dr. Gonzalez was highly improper and prejudicial. This is especially apparent from the prosecutor's unsupported closing statements and the erroneous quotation of Hope's testimony by the Court of Appeals. (App. p. 6; App. p. 22) Even if the initial joinder was arguably proper under Rule 8(b) of the Federal Rules of Criminal Procedure, it was an abuse of discretion for the trial court to deny a severance under Rule 14 of the Federal Rules of Criminal Procedure.

It is respectfully submitted that a writ of certiorari should issue to the Fifth Circuit Court of Appeals to review its opinion herein because the initial and continued joinder of the petitioners with Dr. Gonzalez was prejudicial *per se*.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Appendix

NO. 78-5613
NO. 79-1875

UNITED STATES OF AMERICA,
Appellee,

-vs-

HAROLD KAUFMAN AND RUTH ZICREE,
Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, JAMES LAWRENCE KING, DISTRICT JUDGE

Decided: November 8, 1979
Rehearing Denied: January 11, 1980

BEFORE THORNBERRY, CLARK AND KRAVITCH, CIRCUIT JUDGES

Michael J. Osman, Robert M. Duboff (Michael J. Osman, P.A.) for defendants/appellants Kaufman and Zicree. Joel N. Rosenthal, Assistant United States Attorney for appellee.

THORNBERRY, Circuit Judge:

In this consolidated appeal from multiple convictions for mail fraud, we must decide whether the evidence adduced at trial is sufficient to support the convictions, whether the appellants were improperly joined together in one trial, whether the trial judge erred in denying appellants' motion for a new trial on the basis of newly discovered evidence, whether the trial judge erred in presenting a particular *Allen* charge, and whether the trial judge erred in allowing an expert witness to testify for the government. Because we believe that the trial judge ruled correctly on each of these issues, we affirm the convictions in the court below.

I.

The government brought mail fraud and conspiracy charges against eleven participants in an alleged scheme to inflate medical bills for personal injury plaintiffs in the Miami area. The alleged participants included the appellants—Dr. Kaufman, his assistant, Ruth Zicree, and his former associate, Dr. Gonzalez—plus attorney Anthony Capodilupo and seven of Capodilupo's employees.

The scheme allegedly began in January, 1972, when Florida's no-fault insurance statute[1] took effect. The statute required automobile accident victims to accumulate over $1,000 in medical expenses before they could sue for pain and suffering. The government alleged that Capodilupo employed several "runners"

[1]Fla.Gen.Stat.Ann. §§627.730–.741 (West 1972).

who contacted accident victims and offered to help the victims make money from the accident. The runners referred these victims to Capodilupo, who would explain how the victims needed to run up their medical bills above the $1,000 threshold in the no-fault statute. Capodilupo then referred the victims to doctors such as Kaufman and Gonzalez. These doctors allegedly gave the victims unnecessary treatments and billed the victims for these treatments plus other treatments and services that the doctors never actually performed. After the victims' bills exceeded the $1,000 statutory threshold, Capodilupo would bring suit on behalf of the victims against the other drivers' insurance carriers for pain and suffering. Most of the suits were settled for a few thousand dollars.

The indictment covered alleged acts over the period from January, 1972, to November, 1977. Throughout this period Ruth Zicree worked as Dr. Kaufman's secretary; she helped prepare medical reports and bills among other jobs. Dr. Gonzalez worked with Dr. Kaufman in his office from January, 1973, until January, 1974. In 1974, Dr. Gonzalez opened her own office a few blocks down the street from Dr. Kaufman's office, and continued her medical practice throughout the period covered in the indictment.

The government brought one count of conspiracy and 188 counts of mail fraud relating to thirty-three different accident victims against the eleven defendants. At the conclusion of the government's case at trial, appellants moved for a severance and for acquittal. The judge granted a severance of the eight-person "lawyer group" from the appellants, and denied

the motion for acquittal. Before submitting the case to the jury the judge dismissed twenty-eight counts of mail fraud relating to eight patients against the appellants. The jury returned guilty verdicts against Kaufman and Zicree on eight mail fraud counts relating to two patients, and against Gonzalez on eighteen mail fraud counts relating to four patients. The jury acquitted all appellants of the conspiracy charges.

Kaufman received a sentence of three years on one count to run consecutively with concurrent three-year sentences on the other counts. He was fined $1,000 for each count. Zicree received a sentence of one year on each count, all sentences to run concurrently. Zicree's sentence was modified to require one day's imprisonment, plus probation for the remainder of her concurrent sentences. She was fined $300 for each count. Gonzalez received a sentence of three years on each count, all sentences to run concurrently. She was fined $500 for each count.

II.

[1-3] Appellants contend that the evidence adduced at trial is insufficient to support their mail fraud convictions. Under the mail fraud statute, 18

U.S.C. §1341,[2] the government must prove beyond a reasonable doubt (1) a scheme to defraud, and (2) causing a mailing for the purpose of executing the scheme. *United States v. Shryock,* 537 F.2d 207, 209 (5 Cir. 1976), *cert. denied,* 429 U.S. 1100, 97 S.Ct. 1123, 51 L.Ed.2d 549 (1977). In evaluating the sufficiency of the evidence, we must consider the evidence in the light most favorable to the government. *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). The test for sufficiency of the evidence necessary to support denial of a motion for acquittal is whether the jury might reasonably conclude that the evidence is inconsistent with the hypothesis of the defendant's innocence. *United States v. Lonsdale,* 577 F.2d 923, 925 (5 Cir. 1978).

[2]§1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Appellants contend that our decision in *United States v. Herberman,* 583 F.2d 222 (5 Cir. 1978), requires a reversal of their convictions. In *Herberman* a jury convicted a doctor on twenty of twenty-eight counts for making false Medicare statements requesting payment for services he allegedly did not perform. On appeal we reversed four of the twenty convictions because the evidence was insufficient to establish guilt. These four counts related to four different patients. Three of the patients testified at trial that the treatments they received were actually consistent with the doctor's Medicare statements. The fourth patient testified repeatedly that he did not know whether or not he had received a treatment that the government contended had never been given. Because the testimony by these patients failed to indicate that the doctor's statements about these particular patients were false, and because the government produced no other testimony specifically relating to these four charges, we held that general evidence about the doctor's practices would be insufficient by itself to establish that he made false statements with particular regard to these four patients:

> The government's proof depended primarily on the testimony of the patients of Dr. Herberman and the testimony of the patients on these four counts was clearly insufficient. The general testimony of the investigators, the people from HEW and the ex-employees was not tied to any particular count. Without the patients' testimony, there was no case.

583 F.2d at 231.

[4] We agree with appellants that the *Herberman* decision should guide our analysis in this case, but we find that the evidence adduced by the government at trial satisfies the requirements in *Herberman*. As in *Herberman*, the government provided ample background evidence to establish that a fraudulent scheme existed. Witness Patricia Hope worked as a secretary in Kaufman's office for eight or nine months from mid-1972 until the beginning of 1973. She testified that Kaufman instructed her to record treatments for patients who did not actually receive them. According to Hope, many patients signed the office register, then left the office without seeing a doctor or receiving treatment. In January, 1974, Hope began secretarial work for Gonzalez. She testified that Gonzalez instructed her to follow Kaufman's practice of recording treatments that had not been performed. Another of Gonzalez's employees, Wendy Jones, confirmed Hope's testimony and added other examples of fraudulent billing by Gonzalez. Kaufman himself testified that he was aware of the $1,000 no-fault threshold, and that he kept special records for patients referred to him as automobile accident victims by attorneys such as Capodilupo.

Against this background of general evidence indicating the existence of a mail fraud scheme, the government presented specific testimony from each of the patients related to the counts upon which the appellants were convicted. Kaufman and Zicree were convicted upon counts relating to patients Lacey and Raiford. Lacey testified that he made only six visits to Kaufman's office, although the government produced mailings to show that Kaufman had billed Lacey for sixteen visits. Raiford testified that he made no more than six visits to Kaufman's office, although Kaufman

billed him for twenty-eight visits. Gonzalez was convicted on the count relating to Lacey, a patient at Kaufman's office during the period that Gonzalez worked with Kaufman, as well as on counts relating to Durden, Patricia Hope, and Rickford Hope, who were Gonzalez's patients after she opened her separate office. Durden testified that she made only two visits to Gonzalez's office, although Gonzalez billed her for fifteen visits. Patricia Hope, who worked as Gonzalez's secretary, testified that she made ten to fifteen visits to Gonzalez as a patient, although Gonzalez billed her for forty-nine visits. Rickford Hope testified that he made about thirty-one visits to Gonzalez; but Gonzalez billed him for fifty-seven visits. In contrast to the testimony of the four patients examined in *Herberman*, the testimony of the patients related to convictions in this case shows that the number of treatments that they received is inconsistent with the number of treatments for which they were billed. This testimony satisfies the requirements in *Herberman* for specific evidence about each count relating to a conviction.

Although the evidence strongly establishes Gonzalez's guilt with regard to Durden, Patricia Hope and Rickford Hope, all of whom Gonzalez treated after she opened her own separate office, the evidence establishing Gonzalez's guilt with regard to Lacey, a patient at Kaufman's office while Gonzalez worked with Kaufman, is less strong because Lacey did not testify that he was treated by Gonzalez. Lacey testified that he visited Kaufman's office about six times over a period of three months beginning in January, 1973. Throughout this period Gonzalez worked full time with Kaufman in the office. Patricia Hope's testimony indicates that

Gonzalez participated in the mail fraud scheme during the period that she worked for Kaufman because Gonzalez used the same fraudulent techniques as Kaufman when Gonzalez opened her own office a year later. For example, Hope testified that Kaufman told her to enter the mark "physio" on patients' records whether or not they received this or any other treatment, and that Gonzalez gave identical instructions when Hope began work in her office a year later. Hope testified that in both offices patients often signed the register and left without receiving treatment. Viewed in the light most favorable to the government as required by *Glasser*, this evidence is sufficient to establish Gonzalez's participation in a scheme relating to inflated records and bills for the patient Lacey during the period that Gonzalez worked with Kaufman in his office.

Zicree specially contends that the evidence relating to her role as a secretary is insufficient to establish her guilt in the scheme. Evidentiary exhibits show, however, that Zicree signed or initialed medical reports and bills concerning both Lacey and Raiford. Patricia Hope and Zicree herself testified that Zicree prepared the reports and bills for Kaufman's office.

We also find that the evidence showing each appellant's participation in the scheme is sufficient to show that they knowingly intended to further the scheme through their acts. *See, e.g., United States v. Perez*, 489 F.2d 51, 73 (5 Cir. 1973), *cert. denied*, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974) (repeated actions of participants in scheme sufficient to show intent and to preclude finding of mistake or naivete). None of the appellants contests use of the mails to further the scheme.

III.

At the beginning of the trial the three appellants were tried jointly with Attorney Capodilupo and his seven employees. At the close of the government's case, the judge granted appellants' motion to sever the "lawyer group" from appellants. The judge denied appellants' motion to sever Gonzalez from the trial of Kaufman and Zicree. All appellants now contend that they were improperly joined together for trial, and that the trial judge erred in denying their motion to sever Gonzalez from the trial of Kaufman and Zicree.

[5, 6] A claim of misjoinder is reviewable on appeal as a matter of law. *United States v. Park*, 531 F.2d 754, 760 (5 Cir. 1976). Joinder of defendants requires a balancing of the right of the accused to a fair trial and the public's interest in the efficacious administration of justice. *United States v. Gentile*, 495 F.2d 626, 630 (5 Cir. 1974). This balancing is governed by Fed.R.Crim.P. 8(b), which provides that

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

[7, 8] In deciding whether to allow joinder of defendants under Rule 8(b), the judge must accept as

true the factual allegations of the indictments. *United States v. Levine,* 546 F.2d 658, 663 (5 Cir. 1977). The indictment in this case appears to satisfy Rule 8(b) because it alleges that all defendants participated in the same series of acts or transactions constituting the offense of mail fraud and conspiracy to commit mail fraud. For example, the last count in the indictment alleges a single conspiracy between the lawyer group and all three appellants to inflate medical bills for the purpose of satisfying the $1,000 no-fault threshold for automobile accident litigation. Each count alleges participation by all eleven defendants in the mail fraud scheme. The indictment specifically alleges that Gonzalez worked together in the same office with Kaufman and Zicree during one period of the scheme.

Even though the allegations in the indictment indicate that joinder of Gonzalez with Kaufman and Zicree was proper, appellants contend that the *Levine* case still requires us to reverse their convictions on grounds of misjoinder. After recognizing in *Levine* that the factual allegations in the indictment should be accepted as true for purposes of deciding joinder, we also stated that

> Where, however, the defendant can show that the charge of a joinder of defendants in conspiratorial action is based on a legal interpretation that is improper, the court cannot base its 8(b) ruling on the written words alone but must determine if, under correct legal theory, joint action was actually involved.

546 F.2d at 663. In *Levine* the government alleged a single conspiracy among several defendants when the indictment itself showed that two separate and independent conspiracies actually existed. Because the "only real underpinning for the government's conspiracy count was the false legal premise that proof of proximate or simultaneous conspiracies with one common conspirator was sufficient to establish the existence of a single conspiracy," we reversed one appellant's conviction because he was improperly joined with the other defendants. 546 F.2d at 665.

In *Levine* defendant Abrams contracted with a filmmaker, Harvard, to make an obscene film promoting the career of a particular female dancer. During the same period of time defendant Levine contracted separately with Harvard to produce a series of sixteen obscene films. The government alleged no facts to show that Abrams and Levine had any interaction with each other, or were even cognizant of each other's activity.[3] Neither defendant had any financial or other interest in the other's films. The government attempted to show that Abrams and Levine participated in a single "wheel" conspiracy based on the fact that Harvard used some of the same actors and studios for the separate films of Abrams and of Levine. We rejected the government's argument:

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[3]Of the twenty counts in the indictment, only one count alleged specific joint action by Abrams, Levine, and Harvard. We concluded that Levine's name must have been added by mistake in that count, and that, in the alternative, such an allegation in only one count out of twenty would be insufficient to show a single conspiracy. 546 F.2d at 665.

> For a wheel conspiracy to exist those people who form the wheel's spokes must have been aware of each other and must do something in furtherance of some single, illegal enterprise. . . . If there is not some interaction between those conspirators who form the spokes of the wheel as to at least one common illegal object, the "wheel" is incomplete, and two conspiracies rather than one are charged.

546 F.2d at 663.

Appellants' attempt to show that the government's indictment in this case rests upon a similar, false legal premise involving multiple conspiracies is not persuasive. Unlike Abrams and Levine, who were strangers to each other throughout the time period in issue, Kaufman and Gonzalez worked with each other in the same office for one year covered in the indictment. In addition to this interaction, other evidence indicates the existence of a common scheme between Kaufman and Gonzalez. When Gonzalez left Kaufman's office, she opened her own office a few blocks down the street. Gonzalez employed Patricia Hope, a former secretary for Kaufman. Throughout the period covered in the indictment Gonzalez received patients referred by the lawyer Capodilupo, who also continued to refer other patients to Kaufman's office. The government alleged, and Hope later testified, that Gonzalez used the same methods to inflate medical bills in her office as Kaufman had used in his office. These facts showing interaction between Kaufman and Gonzalez, and a common method to defraud, suggest that Kaufman, his assistant Zicree, and Gonzalez were involved in the

same series of acts or transactions constituting an offense or offenses, as required for proper joinder under Rule 8(b). The government has shown a "substantial identity of facts or participants" between the offenses to make joinder proper according to our decision in *United States v. Marionneaux,* 514 F.2d 1244, 1248-49 (5 Cir. 1975).

The facts in this case do not resemble the one-time commercial transactions charged in *Levine,* in which the only link between two customers for obscene films was each one's independent relation to a common filmmaker. This case more closely resembles the ongoing mail fraud scheme in *United States v. Perez,* 489 F.2d 51 (5 Cir. 1973), *cert. denied,* 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974). In *Perez* the government alleged that twenty-one defendants participated in a scheme to stage fake automobile accidents for the purpose of collecting insurance proceeds. Except for a core group of three organizers, only a few of the other defendants participated in more than one of the staged accidents. Despite this fact, we found that all participants must have intended to serve the same common objective and must have been aware of a larger scheme. 489 F.2d at 57-64. For this reason, we held that joinder was proper for all participants in the ongoing scheme. 489 F.2d at 64-65.

[9] Having found that Kaufman, Zicree, and Gonzalez were properly joined together at the beginning of the trial, we must now decide whether the trial judge erred in denying appellants' motion for a severance of Gonzalez from the trial of Kaufman and Zicree at the close of the government's case. The judge's decision

whether to grant a severance is governed by Fed.R.Crim.P. 14, which provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

As for joinder, the judge considering a motion for severance must balance the right of a defendant to a fair trial against the interests of judicial economy. This balancing process is within the discretion of the trial judge, and an appellate court will not reverse the judge's decision without an affirmative showing that the lower court abused its discretion. *United States v. McLaurin,* 557 F.2d 1064, 1075 (5 Cir. 1977), *cert. denied,* 434 U.S. 1020, 98 S.Ct. 743, 54 L.Ed.2d 767 (1978).

[10] In order to obtain severance under Rule 14, the defendants have the difficult burden of proving that they will suffer the most compelling prejudice from continued joinder; a mere showing of some prejudice is insufficient. *Perez,* 489 F.2d at 65. The test for such prejudice is

> [W]hether under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the

> independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though the task be difficult, severance should not be granted.
>
> * * *
>
> In determing on appeal whether the jury was in fact confused, the court will look to the verdict. Convictions will invariably be sustained if it may be inferred from the verdict that the jury "meticulously sifted the evidence," as where it acquits on certain counts.

United States v. Wasson, 568 F.2d 1214, 1222 (5 Cir. 1978), *quoting Tillman v. United States,* 406 F.2d 930, 935-36 (5 Cir.), *vacated in part on other grounds,* 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969).

[11] Kaufman and Zicree contend that they were prejudiced because the jury might have considered testimony about Gonzalez when they decided to convict Kaufman and Zicree. The record does not indicate, however, that the jury was confused about the testimony. All of the witnesses clearly identified whether their testimony related to Gonzalez, or to Kaufman and Zicree. Moreover, the judge carefully instructed the jury to consider specific testimony relating to only one defendant, such as Patricia Hope's testimony about activities in Gonzalez's office, only against that defendant, and not against the others. The

verdict shows that the jury actually sifted the evidence in reaching their decision on the various counts. Out of 189 counts, the jury convicted Kaufman and Zicree on only eight counts and convicted Gonzalez on only eighteen. The jury appeared to understand the restrictive instructions about the evidence because they convicted Kaufman and Zicree only on counts relating to patients at Kaufman's office, and they convicted Gonzalez only on counts relating to patients at Gonzalez's office, with the exception of the patient Lacey. Gonzalez worked together with Kaufman while Lacey was a patient in Kaufman's office, however, and the evidence sufficiently shows that Gonzalez participated with Kaufman in the mail fraud scheme during this period. For these reaons, we hold that the trial judge did not abuse his discretion when he denied appellants' motion to sever Gonzalez from the trial of Kaufman and Zicree.

IV.

In appeal number 79-1875 appellants Kaufman and Zicree contend that the trial judge erred when he denied their motion for a new trial on the basis of newly discovered evidence. The evidence newly discovered by appellants is the grand jury testimony of Dr. Gaston Maya, who worked in Kaufman's office for two and a half years beginning in the middle of 1974. Appellants claim that the testimony is strongly exculpatory because Maya generally denies seeing any wrongdoing in Kaufman's office. Although the government included Maya's testimony on a 274-item discovery list presented to appellants five and a half months before the trial, appellants contend that they did not read Maya's

testimony because they assumed it would be hostile, and because the government did not alert them to its exculpatory nature. Maya asserted his fifth amendment right against self-incrimination and did not testify at the trial.

[12, 13] The test for consideration of a motion for new trial on the grounds of newly discovered evidence can be summarized as follows:

> . . . The evidence must be discovered following trial; there must have been diligence on the part of the movant to discover the new evidence; the evidence is not merely cumulative or impeaching; the evidence is material; and a new trial would probably produce a new result.

United States v. Prior, 546, F.2d 1254, 1258 (5 Cir. 1977). We hold that the trial judge correctly denied appellants' motion for at least two reasons: Maya's testimony would probably not have produced a different result, and appellants did not exercise diligence in discovering the evidence.

Although Maya generally denied seeing or participating in any wrongdoing while he worked in Kaufman's office, Maya admitted several facts that undercut the exculpatory nature of his testimony. He conceded that records for accident victims were treated separately in the office, and that ninety percent of these patients were hospitalized. Even with regard to the patients that Maya treated in the office, Maya testified that he never filled out accident reports, and that

Kaufman or a secretary filled out all the records. Maya also testified that Kaufman almost always made the decision whether to hospitalize a patient. None of Maya's testimony specifically contradicted the firsthand account of any of the government witnesses who testified at trial. For these reasons, Maya's grand jury testimony would probably not have produced a different result at trial.

The second justification for upholding the judge's denial of a new trial involves the lack of diligence of appellants. During the five and a half months before trial appellants had ample opportunity to read Maya's testimony presented to them on the government's discovery list. Even though the list contained 274 items, these primarily involved specific mailings and records except for the last seven items, which were clearly marked as grand jury testimony. The government had no duty to alert appellants about the questionably exculpatory nature of Maya's testimony, especially when Maya was well known to Kaufman and Zicree as an employee in their own office for two and a half years.

V.

Appellants' two remaining contentions involve the judge's use of a modified *Allen*[4] charge, and the judge's decision to qualify a witness as an expert. We find that neither of these contentions requires reversal on appeal.

[14] After the jury had deliberated for about two and a half days, they reported that they had reached a

[4]*Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, L.Ed. 528 (1896).

verdict with regard to all appellants on some counts, but had reached no verdict on about half of the 189 counts. The judge gave the jury a modified *Allen* charge. Despite an express invitation by the judge, appellants' counsel did not object to the charge or propose curative instructions. We find that the charge was not unduly coercive. The judge did not set a time restraint for the jury, nor did he pressure the jurors in the minority to compromise. The judge remarked to the jury that a new trial would be expensive and exhausting to the litigants, but this observation was obvious to jurors who had already participated in the eight-week trial. We recently upheld an *Allen* charge that alluded to the expense of a retrial in *United States v. Dixon*, 593 F.2d 626, 630-31 (5 Cir. 1979). We find no error with the judge's *Allen* charge in the trial below.

[15] Appellants contend that the judge erred in allowing witness McEachen to qualify as an expert and to give specific testimony about the appellants' patients. The government presented McEachen, a handwriting analyst with the Dade County Public Safety Department for a year and a half, to testify that some of the patients' signatures on the doctors' office registers had been forged. We find that the judge did not abuse his broad discretion in qualifying McEachen as an expert or in admitting his testimony. *See United States v. Viglia*, 549 F.2d 335, 337 (5 Cir.), *cert. denied*, 434 U.S. 834, 98 S.Ct. 121, 54 L.Ed.2d 95 (1977). Although appellants showed a few discrepancies in McEachen's testimony on cross examination, these discrepancies were not significant enough to show that the judge erred in qualifying McEachen as an expert. The judge later ruled that McEachen's testimony about patients Lang

and Freeman should be stricken from the record, but that McEachen's other testimony could remain in the record. We find that this ruling was correct.

VI.

We find that the evidence is sufficient to convict appellants on all counts, and that the judge did not err when he joined the appellants together in the same trial, denied their motion for a new trial on grounds of newly discovered evidence, gave the modified *Allen* charge, or qualified the expert witness. For this reason, we affirm the appellants' convictions in the court below.

AFFIRMED.

in the

United States Court of Appeals

for the Fifth Circuit

NO. 78-5613

UNITED STATES OF AMERICA,
Respondent,

-vs-

HAROLD KAUFMAN AND RUTH ZICREE,
Petitioners.

ON PETITION FOR REHEARING BEFORE THORNBERRY, CLARK, AND KRAVITCH, CIRCUIT JUDGES

PETITION FOR REHEARING DENIED JANUARY 11, 1980

PER CURIAM:

Appellants Kaufman and Zicree's petition for a rehearing is hereby denied. In denying this petition, we would like to clarify a statement challenged by the appellants in the panel opinion, reported at 5 Cir., 605 F.2d 1381. To demonstrate that the evidence at trial was sufficient to sustain the appellants' convictions for mail fraud, we discussed the general background evidence that indicated the existence of a scheme to inflate patients' medical bills and the specific testimony of each patient related to a count upon which the appellants were convicted. *Id.* at 1384-86. The general background evidence included the testimony of Patricia Hope, who worked as a secretary for Kaufman. We summarized her testimony as follows: "She testified that Kaufman instructed her to record treatments for patients who did not actually receive them." *Id.* at 1385.

Appellants correctly contend that Hope did not testify that Kaufman gave her these specific instructions. Hope did testify, however, that the procedure in Kaufman's office was to record treatments for patients who did not actually receive them. Record, vol. 7, at 401. Hope testified that Kaufman specifically instructed her to leave spaces on the patients' records between the dates recorded for actual visits so that Kaufman could write in the spaces later. *Id.* at 410. Hope also testified that she overheard Kaufman telling patients to sign the register book on back dates so that the register would show more treatments for the patients than they actually received. *Id.* at 429. This testimony provides ample background evidence to indicate the existence of a scheme to inflate medical bills. This background evidence, together with the specific testimony of the patients who said that appellants billed

them for many more visits than the patients actually received, shows that the evidence at trial was sufficient to sustain the appellants' convictions.

In all other respects the petition for rehearing filed by appellants Kaufman and Zicree is DENIED. The petition for rehearing filed by appellant Gonzalez is also DENIED.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March, 1980, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Solicitor General, Department of Justice, Washington, D.C. 20530, and to the United States Attorney, 300 Ainsley Building, Miami, Florida 33132. I further certify that all parties required to be served have been served.

MICHAEL J. OSMAN, P.A.
Counsel for Petitioners

BY /s/ Michael J. Osman
MICHAEL J. OSMAN